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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 GERARDO HUGO PUTKKURI,  
12 Plaintiff,  
13 vs.  
14 RECONTRUST COMPANY, DOE 1,  
DOES 2-50, inclusive,  
15 Defendants.

CASE NO. 08cv1919 WQH (AJB)

**ORDER**

HAYES, Judge:

16 The matter before the Court is the Motion to Dismiss Complaint or, in the Alternative,  
17 for a More Definite Statement (Doc. # 4).  
18

**Background**

19 On or about August 12, 2008, Plaintiff initiated this action by filing a Complaint in the  
20 Superior Court of California, County of San Diego. *Not. of Removal*, p. 2. On October 17,  
21 2008, Defendant Recontrust Company (“Recontrust”) removed the Complaint to this Court  
22 (Doc. # 1). The Complaint alleges that Plaintiff owns real property in San Marcos, CA (the  
23 “Property”). The Complaint alleges that Plaintiff has a residential loan for the Property  
24 secured by a Deed of Trust. The Complaint alleges that Recontrust is the appointed trustee  
25 to the Deed of Trust. The Complaint alleges that Defendants Recontrust, Doe 1, and Does 2-  
26 50 “are proceeding toward a Trustee’s sale of” the Property. The Complaint alleges that Doe  
27 1 is the “holder of the note identified in the [Deed of Trust].” *Complaint*, ¶ 7. The Complaint  
28 alleges:

1 Doe 1 has no present right to initiate foreclosure under the [Deed of Trust]  
 2 identified in the Notice of Sale . . . , nor does it have the right to direct the  
 3 Recontrust Company to foreclose and sell the subject real property owned by  
 4 Plaintiff. Recontrust Company has been put on notice of Plaintiff's claim in this  
 5 regard, and demand has been made of Recontrust Company to suspend any  
 6 foreclosure sale unless and until it has obtained proof that Doe 1 actually has in  
 its possession the original note properly endorsed to it or assigned to it as of a  
 date preceding the notice of default recorded by Recontrust Company.  
 Recontrust Company has failed and refused to suspend the sale of the property  
 or to provide proof of the basis of the right of Doe 1 to initiate foreclosure under  
 the [Deed of Trust].

7 *Id.*, ¶ 8. The Complaint alleges that Plaintiff demanded written proof of Defendants' right to  
 8 proceed in foreclosure, and that no such proof has been offered. The Complaint alleges that  
 9 Defendants have "engaged[d] in a pattern and practice of utilizing the non-judicial foreclosure  
 10 procedures of this State to foreclose on properties when they do not, in fact, have the right to  
 11 do so;" and have used the United States mail in furtherance of their conspiracy. *Id.*, ¶¶ 9, 13.  
 12 The Complaint alleges that in pursuing non-judicial foreclosure, Defendants falsely  
 13 represented that they had a right to payment under Plaintiff's residential loan, which was  
 14 secured by the Deed of Trust.

15 The Complaint alleges causes of action for "Unfair Debt Collection Practices;"  
 16 "Predatory Lending Practices;" and "RICO." *Complaint*, p. 8-9. In support of the cause of  
 17 action for Unfair Debt Collection Practices, the Complaint alleges that Defendants "have  
 18 violated provisions of California's Rosenthal Fair Debt Collection Practices Act, including but  
 19 not limited to Civil Code § 1788(e) and (f)," ("RFDCPA"), the Federal Fair Debt Collections  
 20 Act, 15 U.S.C., Title 41, Subchap. V, §§ 1692, *et seq.*" ("FDCPA"), and the Real Estate  
 21 Settlement Procedures Act . . . , 12 U.S.C. §§ 2601-2617" ("RESPA"). *Id.*, ¶¶ 19, 20. In  
 22 support of the cause of action for Predatory Lending Practices, the Complaint alleges that  
 23 "[a]ssuming arguendo that Defendant, Doe 1 does have the right . . . to initiate foreclosure  
 24 . . . then Defendant Doe 1 is subject to defenses that would have been available against  
 25 Decision One Mortgage Company, LLC" ("Decision One"), the initial Lender identified in the  
 26 Deed of Trust. *Id.*, ¶ 22. The Complaint alleges that Decision One Mortgage Company, LLC  
 27 "has engaged in deceptive practices with respect to Plaintiff . . . the specifics of which are  
 28 unknown," in violation of the Home Ownership and Equity Protection Act, 15 U.S.C. §§ 1637

1 (“HOEPA”), the Truth in Lending, 15 U.S.C. § 1601 (“TILA”), Regulation Z, 12 C.F.R. 226,  
 2 and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (“FTC Act”). *Id.*, ¶ 23. In support  
 3 of the cause of action for RICO, the Complaint alleges that “Defendants and each of them were  
 4 participating in and have participated in a scheme of racketeering as that term is defined in  
 5 RICO 18 U.S.C. §§ 1961, *et seq.*” *Id.*, ¶ 26.

6 On October 24, 2008, Recontrust filed the Motion to Dismiss. Plaintiff has not filed an  
 7 opposition to the Motion to Dismiss.

### 8 Standard of Review

9 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests  
 10 the legal sufficiency of the pleadings. *See De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.  
 11 1978). A complaint may be dismissed for failure to state a claim under Rule 12(b)(6) where  
 12 the factual allegations do not raise the right to relief above the speculative level. *See Bell*  
 13 *Atlantic v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Conversely, a complaint may not be  
 14 dismissed for failure to state a claim where the allegations plausibly show that the pleader is  
 15 entitled to relief. *See id.* (citing Fed R. Civ. P. 8(a)(2)). In ruling on a motion pursuant to Rule  
 16 12(b)(6), a court must construe the pleadings in the light most favorable to the plaintiff, and  
 17 must accept as true all material allegations in the complaint, as well as any reasonable  
 18 inferences to be drawn therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003);  
 19 *see also Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996).

### 20 Analysis

#### 21 A. Recontrust’s Right to Initiate the Foreclosure Process

22 Recontrust contends that, as trustee under Plaintiff’s Deed of Trust, it has the right to  
 23 initiate the foreclosure process on behalf of Plaintiff’s lender and the owners of the note.  
 24 Recontrust contends that California law does not require production of the original note to  
 25 proceed with a non-judicial foreclosure. Defendant therefore contends that “Plaintiff’s  
 26 allegation that Defendant has no right to foreclose on his property is incorrect.” *Mot. to*  
 27 *Dismiss*, p. 6.

Pursuant to section 2924(a)(1) of the California Civil Code, the trustee of a Deed of Trust has the right to initiate the foreclosure process. Cal. Civ. Code § 2924(a). Production of the original note is not required to proceed with a non-judicial foreclosure. *Id.* Viewing the allegations in the light most favorable to Plaintiff, the Complaint does not establish that Defendant, as trustee of the Deed of Trust, lacks the right to initiate the foreclosure process.

B. Cause of Action for Unfair Debt Collection Practices

Recontrust contends that the Complaint fails to state a claim under the RFDCPA or the FDCPA because the Complaint does not allege that Defendants engaged in any harassment or abuse; that the Defendants used false or misleading representations; or that Defendants engaged in any unfair practices. Recontrust contends that the Complaint fails to state a claim under the RESPA because “Plaintiff does not allege any improper kickbacks in violation of 12 U.S.C. § 2607,” and “[t]o the extent that Plaintiff claims disclosure-related violations, the claims must be dismissed because there is no private right of action under the disclosure rules of RESPA.” *Mot. to Dismiss*, p. 7.

To be liable for a violation of the FDCPA or the RFDCPA, the defendant must - as a threshold requirement - be a “debt collector” within the meaning of the Acts. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995); Cal. Civ. Code § 1788.2(c). The “activity of foreclosing on [a] property pursuant to a deed of trust is not the collection of a debt within the meaning of the” FDCPA. *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002) (holding that the plaintiff improperly brought a claim challenging the lawfulness of foreclosure proceedings pursuant to a deed of trust under the FDCPA). The Complaint fails to state a claim under the FDCPA or the RFDCPA because Plaintiff challenges the lawfulness of foreclosure proceedings on her home pursuant to a deed of trust; Plaintiff does not allege that Defendants were debt collectors, collecting a debt within the meaning of the FDCPA or the RFDCPA.

The Complaint does not identify the provisions of the RESPA that Defendants violated. The Complaint does not allege improper kickbacks in violation of 12 U.S.C. 2607, or that Recontrust was a “loan servicer” as required for a violation of 12 U.S.C. section 2605. To the

1 extent the Plaintiff is attempting to assert disclosure-related violations, there is no private right  
 2 of action under the disclosure rules of the RESPA. *Bloom v. Martin*, 865 F. Supp. 1377, 1384-  
 3 85 (N.D. Cal. 1994). The Court concludes that the Complaint fails to state a claim under the  
 4 RESPA.

5 C. Cause of Action for Predatory Lending Practices

6 Recontrust contends that the Complaint fails to state a claim under the HOEPA, TILA,  
 7 Regulation Z or the FTC Act because Plaintiff has not alleged that Defendants engaged in any  
 8 deceptive practices, or that Defendants were involved in the origination of Plaintiff's loan.

9 In support of the cause of action for Predatory Lending Practices, the Complaint alleges  
 10 wrongdoing on the part of Decision One. Decision One is a third party not named as a  
 11 defendant. The Complaint alleges Decision One committed unspecified acts which violated  
 12 unspecified provisions of federal law. The Complaint does not allege that any of the named  
 13 Defendants engaged in deceptive practices or otherwise engaged in predatory lending  
 14 practices. The Court concludes that the Complaint fails to state a claim for predatory lending  
 15 practices because Plaintiff does not allege that any of the named Defendants engaged in  
 16 conduct that violated the HOEPA, TILA, Regulation Z or FTC Act.

17 D. Cause of Action for RICO

18 Recontrust contends that the cause of action for RICO fails because "Plaintiff's  
 19 Complaint does not contain the required allegations." *Mot. to Dismiss*, p. 9. Recontrust  
 20 contends that the Complaint does not allege that Plaintiff's loan constitutes an "unlawful debt;"  
 21 or that Defendant engaged in "any indictable acts punishable by a year or more in prison, let  
 22 alone the two or more criminal acts required to show a 'pattern of racketeering activity' under  
 23 18 U.S.C. §§ 1961(5) and 1962." *Id.*, p. 8-9.

24 To state a RICO claim, the plaintiff must allege the existence of an "enterprise" and the  
 25 connected "pattern of racketeering activity." 18 U.S.C. § 1962; *United States v. Turkette*, 452  
 26 U.S. 576, 582 (1981). "The Ninth Circuit has held that allegations of predicate acts under  
 27 RICO must comply with Rule 9(b)'s specificity requirements." *U.S. Concord, Inc. v. Harris*  
 28 *Graphics Corp.*, 757 F. Supp. 1053, 1061 (N.D. Cal. 1991) (citing *Schreiber Distributing Co.*

1 v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1400-01) (9th Cir. 1986). A RICO plaintiff must  
2 allege the time, place and manner of each act of fraud, and the role of each defendant in the  
3 fraud. *Lancaster Community Hospital v. Antelope Valley Hospital Dist.*, 940 F.2d 397, 405  
4 (9th Cir. 1991). Aside from the conclusory allegation that “Defendants and each of them were  
5 participating in and have participated in a scheme of racketeering as that term is defined in  
6 RICO 18 U.S.C. §§ 1961, *et seq.*,” Plaintiff fails to allege with any specificity the existence of  
7 a RICO enterprise, or the conduct of a pattern of racketeering. The Court concludes that the  
8 Complaint fails to state a claim under RICO.

9 **Conclusion**

10 The Motion to Dismiss (Doc. # 4) is **GRANTED**. The above-captioned action is  
11 **DISMISSED**.

12 DATED: January 5, 2009

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14 **WILLIAM Q. HAYES**  
15 United States District Judge  
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